

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

STATE OF WASHINGTON,

Plaintiff,

V.

FRANCISCAN HEALTH SYSTEM
d/b/a CHI FRANCISCAN HEALTH;
FRANCISCAN MEDICAL GROUP;
THE DOCTORS CLINIC, A
PROFESSIONAL CORPORATION; and
WESTSOUND ORTHOPAEDICS, P.S.,

Defendants.

NO.

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER RELIEF**

**[REDACTED PUBLIC
VERSION]**

Plaintiff, the State of Washington (the “State”), petitions this Court, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and the Washington Consumer Protection Act, RCW 19.86.080, for an injunction against Defendants Franciscan Health System d/b/a CHI Franciscan Health (“FHS”); Franciscan Medical Group (“FMG,” and together with FHS, “CHI Franciscan”); The Doctors Clinic, A Professional Corporation (“The Doctors Clinic” or “TDC”); and WestSound Orthopaedics, P.S. (“WestSound” or “WSO”) (collectively, “Defendants”), including their agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, permanently rescinding, enjoining, and granting other relief against their agreement, merger, acquisition, consolidation, or affiliation pursuant to certain agreements

1 entered on or about July 1, 2016, and September 6, 2016, in violation of Section 1 of the
 2 Sherman Act, 15 U.S.C. § 1; Section 7 of the Clayton Act, 15 U.S.C. § 18; and RCW 19.86.030
 3 and 19.86.060 of the Washington Consumer Protection Act.
 4

5 In support of this Complaint, the State alleges as follows:
 6

7 **I. INTRODUCTION**

8 1. This lawsuit seeks to undo two transactions that have raised prices and
 9 decreased competition for healthcare on the Kitsap Peninsula. In the first transaction, which
 10 took effect on or about July 1, 2016, CHI Franciscan acquired the assets of WestSound, a
 11 physician practice of seven orthopedists based in Silverdale, Washington (the “WestSound
 12 Acquisition”).

13 2. In the second transaction, which took effect on or about September 3, 2016,
 14 CHI Franciscan entered into a set of agreements with The Doctors Clinic, an approximately
 15 fifty-four physician multispecialty practice also based in Silverdale. TDC and CHI Franciscan
 16 agreed that TDC would receive CHI Franciscan’s negotiated reimbursement rates with payers,
 17 and CHI Franciscan acquired certain ancillary services from TDC. Unlike the WestSound
 18 Acquisition, CHI Franciscan did not acquire TDC’s medical practice assets, and CHI
 19 Franciscan and TDC remain separate entities (the “TDC Affiliation,” and together with the
 20 WestSound Acquisition, the “Kitsap Transactions”).

21 3. In announcing the Kitsap Transactions, Defendants have touted them as “an
 22 exciting direction for Kitsap County residents and families” on the purported grounds that they
 23 “enhance patient access and efficiency.” In private and even public statements, however,
 24 Defendants have revealed their true motivation for the deals: to win the ability to charge higher
 25 rates for physician services, and to collectively gain negotiating clout over healthcare payers by
 26 removing head-to-head competition.

1 4. Defendants recognized that TDC's sale of ancillary surgical ("ASC"), imaging,
 2 and laboratory services to CHI Franciscan would enable the latter to effectively shut down the
 3 facilities providing those services and shift their outpatient procedures to CHI Franciscan's
 4 inpatient hospital in Kitsap County, benefiting from higher, hospital-based rates. CHI
 5 Franciscan's Chief Financial Officer, Mike Fitzgerald, revealed this goal to a colleague in an
 6 internal e-mail: "I am all for taking advantage of hospital based pricing, if we think it is doable
 7 in the market and the market can support it. It would be great to drop a couple of million more
 8 to our bottom line, if we think we can do it." TDC sold these services even as it acknowledged
 9 that Kitsap Peninsula residents would receive inferior, costlier care. TDC's former physician
 10 president succinctly summarized these effects to its current medical director: "I can't wait to
 11 hear how CHI messages the addition of TDC to FMG. 'You can now get your outpatient care
 12 in a complex, relatively unsafe, and vastly more expensive location. You are welcome, Kitsap
 13 County...[']"

14 5. From its headquarters in Tacoma, CHI Franciscan has spread northward up both
 15 sides of Puget Sound through a series of significant acquisitions in approximately the past five
 16 years. These acquisitions include Kitsap County's only civilian acute-care hospital, Harrison
 17 Medical Center ("Harrison"), with campuses in Bremerton and Silverdale, in 2013; Highline
 18 Medical Center and Highline Medical Group in Burien in 2013; and Olympic Radiology and
 19 Advanced Medical Imaging in Bremerton and Silverdale, respectively, in 2015. These rapid
 20 acquisitions prompted TDC's medical director to suggest, while in negotiations with CHI
 21 Franciscan, that the "theme song for the Franciscan Health System" should be Queen's
 22 "Another One Bites the Dust." The Kitsap Transactions were the top two priorities in CHI
 23 Franciscan's "Peninsula physician strategy," which CHI Franciscan viewed as a way to ensure
 24 that lucrative surgical procedures would be referred to its wholly-owned hospital, Harrison,
 25 rather than to non-CHI Franciscan hospitals in Seattle and Tacoma. This strategy would also
 26

1 “[s]tem the loss of portable elective cases going to [TDC’s] competitor ASC (now an
 2 affiliate).”

3 6. Defendants further realized that the Kitsap Transactions would allow them to
 4 collectively gain leverage to obtain higher payments in their negotiations with healthcare
 5 payers. A CHI Franciscan summary of the transactions listed one of the “Affiliation Synergies”
 6 realized through the deals: “Improved reimbursement for” TDC and WSO “through payor
 7 contracting.” In publicly explaining how the TDC Affiliation worked, FMG’s Chief Operating
 8 Officer, Dr. Peter O’Connor, acknowledged to the *Tacoma News Tribune* that “[t]he
 9 partnership will allow The Doctors Clinic to remain physician-owned,” but CHI Franciscan
 10 would take over “back-of-house duties such as negotiating with insurance companies for
 11 rates.” Dr. O’Connor further admitted in a *Kitsap Daily News* article that the purpose of the
 12 TDC Affiliation was to enable CHI Franciscan and TDC to obtain higher reimbursements from
 13 payers: “If you’re bigger, you are able to negotiate better contracts.”

14 7. Bigger, however, has not been better for healthcare consumers on the Kitsap
 15 Peninsula. It has been far worse. As a result of Defendants’ *per se* unlawful price fixing
 16 through the TDC Affiliation, and their anticompetitive merger via the WestSound Acquisition,
 17 commercial healthcare payers on the Kitsap Peninsula were forced overnight to increase the
 18 contractual reimbursements they paid to TDC and WestSound physicians, including overall
 19 increases for some payers of over [REDACTED] percent. The rate increases affected the vast
 20 majority of diagnoses and procedures covered by the contracts those payers had in effect with
 21 Defendants, and included procedures such as total abdominal hysterectomy (for which one
 22 payer saw its allowable charges increase by [REDACTED] % at TDC), laparoscopic cholecystectomy (i.e.,
 23 gall bladder removal—a [REDACTED] % increase at TDC), and arthroscopically aided anterior cruciate
 24 ligament (“ACL”) repair or replacement (a [REDACTED] % increase at WSO). The Kitsap Transactions
 25 have increased costs for commercial healthcare payers, self-insured employers, and individual
 26

1 patients who have had to pay higher out-of-pocket costs. Payers can no longer use the presence
 2 of multiple independent providers to obtain favorable rates in reimbursement negotiations.

3 Kitsap Peninsula patients have seen increased wait times, difficulty in scheduling procedures,
 4 and a reduction in their choice of services and locations.

5 8. The Kitsap Transactions reflect a national trend of consolidation and a loss of
 6 competition in the healthcare industry, which is continuing to fuel growth in healthcare
 7 spending. An April 2017 report co-authored by the Brookings Institution noted that
 8 acquisitions of physician practices by hospitals result in substantial increases in price, and
 9 “prices for physician services have been shown to be higher in more concentrated markets with
 10 fewer potential competitors.”

11 9. In addition to the TDC Affiliation’s *per se* illegality, both Kitsap Transactions
 12 have helped Defendants accumulate market power. Because of the WestSound Acquisition and
 13 the fact that through the TDC Affiliation, TDC’s orthopedic physicians now bill under CHI
 14 Franciscan’s payer contracts, CHI Franciscan now controls billing for all but a small handful of
 15 orthopedists on the Kitsap Peninsula. The TDC Affiliation also means that CHI Franciscan and
 16 TDC now possess market power in the provision of adult PCP services on the Kitsap
 17 Peninsula. Defendants’ market power has harmed competition and raised healthcare prices in
 18 Kitsap County and on the greater Kitsap Peninsula, and will continue to harm competition and
 19 consumers unless this Court enjoins the Kitsap Transactions.

20 **II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE**

21 10. This Court has subject matter jurisdiction over this action under Sections 4(a)
 22 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331 and 1337(a). This
 23 Court has supplemental jurisdiction over the State of Washington’s state law claims under 28
 24 U.S.C. § 1367.

1 11. Defendants each transact business and maintain their principal places of
 2 business within the Western District of Washington and are each subject to personal
 3 jurisdiction therein. Furthermore, all or a substantial part of the events giving rise to the State's
 4 claims occurred within the Western District of Washington. Venue, therefore, is proper in this
 5 District under 28 U.S.C. § 1331(b)–(c) and Section 12 of the Clayton Act, 15 U.S.C. § 22.

6 12. Defendants are engaged in, and their activities substantially affect, interstate
 7 trade and commerce. For example, Defendants contract with and receive payments from
 8 national commercial health plans, such as Aetna and UnitedHealthcare (a subsidiary of
 9 UnitedHealth Group), that are headquartered and conduct business outside Washington. CHI
 10 Franciscan's financial results are reported to and made part of the financial results of its
 11 corporate parent, Colorado-based Catholic Health Initiatives ("CHI"), and CHI has input into
 12 CHI Franciscan's budget.

13 **III. THE PARTIES**

14 13. The Plaintiff is the State of Washington, a sovereign state within the United
 15 States, acting through the Antitrust Division of the Office of Attorney General Robert
 16 Ferguson, the chief law enforcement officer of the State. The State has authority to bring this
 17 action under Section 16 of the Clayton Act, 15 U.S.C. § 26, and under the Washington
 18 Consumer Protection Act, RCW 19.86.080. The State of Washington brings this action in its
 19 sovereign capacity and as *parens patriae* on behalf of the citizens, general welfare, and
 20 economy of the State. The Antitrust Division of the Office of the Attorney General of the State
 21 of Washington is headquartered at 800 Fifth Avenue, Suite 2000, Seattle, Washington 98104.

22 14. Defendant Franciscan Health System, doing business as CHI Franciscan Health,
 23 is a non-profit corporation organized and existing under the laws of Washington with its
 24 headquarters at 1717 South J Street, Tacoma, Washington 98405. FHS's sole voting member is
 25 non-defendant CHI, a Colorado non-profit corporation.

1 15. Defendant Franciscan Medical Group, also doing business as CHI Franciscan
 2 Health, is a non-profit corporation organized and existing under the laws of Washington.
 3 FMG's sole member is Defendant FHS. FMG's headquarters are located at 1313 Broadway
 4 Plaza, Suite 200, Tacoma, Washington 98201. FMG physicians practice at 22 clinic locations
 5 on the Kitsap Peninsula, excluding locations that were acquired or assumed as part of the
 6 Kitsap Transactions. Operationally, FMG functions as the wholly-owned subsidiary of
 7 Defendant FHS.

8 16. Defendant The Doctors Clinic is a professional corporation organized and
 9 existing under the laws of Washington with headquarters at 9621 Ridgetop Boulevard NW,
 10 Silverdale, Washington 98383. At the time of the TDC Affiliation, TDC maintained seven
 11 locations, all within Kitsap County, employing approximately 54 physicians in specialties
 12 including family medicine, internal medicine, orthopedics, urology, general surgery, obstetrics
 13 and gynecology, and cardiology.

14 17. Before the WestSound Acquisition took effect, Defendant WestSound was a
 15 professional services corporation organized and existing under the laws of Washington located
 16 at 4409 NW Anderson Hill Road, Silverdale, Washington 98383. WestSound offered
 17 orthopedic services from its main location in Silverdale and from a satellite office on
 18 Bainbridge Island. At the time of the WestSound Acquisition, WestSound employed seven
 19 physicians, all of whom specialized in orthopedic care. As a result of the WestSound
 20 Acquisition, WestSound became wholly owned by CHI Franciscan on or about July 1, 2016.

21 18. Except to the extent competition has been illegally restrained as alleged herein,
 22 Defendants FHS and FMG have been, and are now, in competition with Defendant TDC for
 23 the provision of at least Adult PCP and Orthopedic Physician Services (defined below at
 24 Paragraphs 35 and 36) and other physician services. Furthermore, until the anticompetitive
 25 consummation of the WestSound Acquisition as alleged herein, Defendants FHS and FMG
 26

were in competition with Defendant WestSound for the provision of Orthopedic Physician Services. As described more fully below, healthcare payers have relied on competition between CHI Franciscan and TDC, and CHI Franciscan and WestSound, to obtain favorable contractual rates under which they compensate Defendants and others for physician services. In addition, FMG providers compete and/or competed with TDC and WestSound providers to attract patients based on location, reputation for quality, provider availability, perceived patient experience, and other factors.

IV. THE MARKET FOR HEALTHCARE SERVICES

A. Competition between healthcare providers

19. Competition between healthcare providers occurs in two stages. In the first stage, providers compete to be included in provider networks assembled by health plans (or “payers”). In order to offer a competitive insurance product, health plans must offer provider networks with sufficient geographic coverage and scope of services to attract employers (who are the predominant purchasers of commercial insurance), their employees, and independent purchasers of “non-group” insurance, such as products offered on Washington’s health benefit exchange. Health plans must also offer networks with sufficient geographic coverage and scope of services to meet network adequacy requirements set by the Washington Office of the Insurance Commissioner. In-network status gives providers preferential access to a health plan’s members, as it is typically far less costly for a health plan member to receive services from an in-network provider. All else being equal, an in-network provider is more likely to attract patients from a given health plan than an out-of-network provider.

20. Barring an unlawful agreement among competing physician practices on price or other terms, physician practices decide unilaterally whether to enter into payer contracts to provide services to payers’ members, and what prices they will accept pursuant to those contracts. Through a process of selective contracting, health plans and providers negotiate the

1 prices that in-network providers receive when they render services to the health plan's
 2 members. During negotiations, the health plan's ability to obtain lower prices from a provider
 3 depends in part on the existence of competing healthcare providers. A health plan is able to
 4 negotiate lower reimbursement rates when it can credibly threaten to exclude a given provider
 5 from its network—that is, when it has a viable outside option. Competition for inclusion in a
 6 health plan's network gives providers an incentive to offer lower rates and other favorable
 7 terms. On the other hand, when there are few or no meaningful alternatives, a provider will
 8 have greater bargaining leverage to demand and obtain higher reimbursement rates and other
 9 favorable terms.

10 21. Health plans pass on increased reimbursement rates to their individual members
 11 in the form of higher premiums, co-pays, co-insurance, and deductibles. There are also
 12 significant increases for employers as purchasers of insurance, as they typically pay a large
 13 portion of their employees' premiums. Lastly, self-insured employers, which bear the full cost
 14 of their employees' claims rather than pool risk with other employers through a health plan,
 15 also feel the impact of higher reimbursement rates.

16 22. In the second stage of healthcare provider competition, in-network providers
 17 compete with one another to attract a health plan's members. Because health plan members
 18 typically face similar out-of-pocket costs for all in-network providers, providers in the same
 19 network must compete for patient volume on non-price factors, such as location, wait times,
 20 convenience, quality of care, and patient satisfaction.

21 23. Price competition among healthcare providers therefore occurs in the first stage
 22 of healthcare competition. However, when there is a merger of competing providers, as
 23 opposed to an affiliation between competing providers for payer contracting alone, second
 24 stage non-price competition is also eliminated, and the merged entity's incentive to maintain
 25 and improve quality is reduced.

1 **B. Payment models for physician services**

2 24. Major commercial health plans commonly structure payments in their provider
 3 contracts around the Medicare Resource Based Relative Value System (“RBRVS”), the
 4 primary method that the United States Centers for Medicare and Medicaid Services (“CMS”)
 5 uses to set physician payment rates under Medicare and Medicaid. In addition to payer
 6 contracting, the RBRVS model is often used, at least in part, to structure the compensation
 7 formulae in physician employment agreements.

8 25. Under the RBRVS system, CMS assigns a work Relative Value Unit (“RVU” or
 9 “wRVU”) to each distinct physician service, taking into account factors such as the time, skill,
 10 and equipment needed to render that service to a patient. For example, a routine office visit for
 11 evaluation and management may have a wRVU of 1.50, while a total knee replacement may
 12 have a wRVU of 20.72. CMS annually determines the price that physicians are paid for each
 13 service by multiplying the wRVU by a set dollar conversion factor (e.g., a 1.50 wRVU for an
 14 office visit is multiplied by the 2017 CMS conversion factor of \$35, rendering a \$52.50 fee for
 15 that physician service). Under the RBRVS model, physicians are paid based upon the volume
 16 of services they perform as measured by wRVUs. The wRVU system thus represents the
 17 volume, but not the quality or efficiency, of services provided by physicians. This wRVU-
 18 based system is the model used by many commercial payers, including those on the Kitsap
 19 Peninsula, in fee-for-service contracts.

20 26. When commercial payers use the RBRVS system to structure their contracts
 21 with providers, some payers negotiate the reimbursement rate as a different conversion factor
 22 (e.g., a commercial conversion factor of \$45 instead of Medicare’s conversion factor of \$35).
 23 Other payers might structure and negotiate the reimbursement rates as a percentage of the
 24 Medicare RBRVS fee for a particular year (e.g., 110% of 2017 RBRVS, or 110% of the wRVU
 25 multiplied by the conversion factor).

1 **C. Healthcare services on the Kitsap Peninsula**

2 27. The Kitsap Peninsula lies between Puget Sound and Hood Canal, surrounded
 3 almost entirely by water. Kitsap County covers the majority of the peninsula, with parts of
 4 Pierce County covering the southern region and parts of Mason County covering the
 5 southwestern region. The Kitsap Peninsula's largest population center is Bremerton; other
 6 population centers include Bainbridge Island, Silverdale, Port Orchard, Poulsbo, and Gig
 7 Harbor. The Kitsap Peninsula is connected to Tacoma to the southeast via the Tacoma Narrows
 8 toll bridge, Seattle to the east via ferry, and rural Jefferson and Clallam Counties to the
 9 northwest via the Hood Canal Bridge. These geographic barriers create a strong and
 10 empirically observable preference by Kitsap Peninsula residents to receive medical care close
 11 to their homes on the Kitsap Peninsula.

12 28. CHI Franciscan owns the only two civilian general acute-care hospitals on the
 13 Kitsap Peninsula: Harrison, the only civilian acute-care hospital in Kitsap County, with
 14 campuses in Bremerton and Silverdale; and St. Anthony Hospital, located in Gig Harbor (in
 15 Pierce County). CHI Franciscan also has two medical groups that provide primary and
 16 specialty care, as well as surgical services, on the Kitsap Peninsula: FMG and Harrison Health
 17 Partners (“HHP”). Prior to the Kitsap Transactions, FMG consisted of approximately 428
 18 physicians who provide care in King, Pierce, and Kitsap Counties, and HHP consisted of
 19 approximately 89 physicians who primarily serve the Kitsap and Olympic Peninsulas.
 20 Effective July 2, 2017, HHP physicians became employed physicians of FMG. Combined,
 21 HHP and FMG physicians practice at approximately 22 clinic locations on the Kitsap
 22 Peninsula, nine of which offer adult primary care services and four of which offer orthopedic
 23 services.

24 29. TDC operates seven locations, all located within Kitsap County, including an
 25 ambulatory surgery center. Of its 54 physicians, TDC employs 13 adult primary care
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1 physicians at four locations in Silverdale, Port Orchard, and Poulsbo, and five orthopedists in
 2 Silverdale.

3 30. WestSound's orthopedists (now employed by FMG) primarily practice at its
 4 main Silverdale clinic location. WestSound also has a satellite location in Bainbridge Island.

5 31. On the Kitsap Peninsula, there are limited offerings for adult primary care
 6 services besides CHI Franciscan and The Doctors Clinic. Kaiser Permanente of Washington
 7 (formerly Group Health Cooperative) does not contract with competing health plans for its
 8 physicians' services, and therefore its physicians' services are, with limited exceptions,
 9 accessible only by Kaiser Permanente health plan members. Kaiser Permanente of Washington
 10 has three primary care clinics within Kitsap County. Seattle-based Virginia Mason Medical
 11 Center and Swedish Medical Center each have a single primary care clinic location in
 12 Bainbridge Island. Tacoma-based MultiCare Health System ("MultiCare") offers primary care
 13 services at its Gig Harbor medical clinic, located south of Kitsap County. There is also a
 14 handful of small, independent primary care practices on the Kitsap Peninsula. These practices
 15 typically consist of one or two adult PCPs, and many are structured as "concierge" practices
 16 that only accept cash payments and/or a monthly membership fee, instead of contracting with
 17 health plans.

18 32. The Kitsap Peninsula also has limited offerings for orthopedic services beyond
 19 what Defendants offer. As a result of the Kitsap Transactions, nearly all orthopedic physicians
 20 within the Kitsap Peninsula are either employed by or contracted with CHI Franciscan. Outside
 21 of CHI Franciscan, there are approximately two additional orthopedists at MultiCare's Gig
 22 Harbor clinic, and one orthopedist at Virginia Mason's Bainbridge Island clinic.

23 33. CHI Franciscan is also the sole owner of an accountable care organization,
 24 Rainier Health Network ("RHN"), that includes patients and providers on the Kitsap Peninsula.
 25 An accountable care organization ("ACO") may take many forms, but usually refers to a
 26

1 network of providers that come together for the purpose of taking on responsibility for the total
 2 cost of care for a given patient population through value-based contracts with health plans.

3 RHN was originally formed as a Medicare Shared Savings Program ACO, but has since
 4 expanded to include contracts with commercial payers. RHN includes FMG, HHP, and
 5 Harrison. TDC has participated in RHN since 2014. WestSound also participated in RHN prior
 6 to the WestSound Acquisition.

7 **V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS**

8 34. “Determination of the relevant product and geographic markets is a necessary
 9 predicate to deciding whether a merger contravenes the Clayton Act,” *Saint Alphonsus Med.*
 10 *Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quotation
 11 omitted), and is an element of a Section 1 case under the rule of reason, *see Tanaka v. Univ. of*
 12 *S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). As the State describes below, the TDC Affiliation
 13 alleged in Count One is *per se* unlawful and requires no pleading or proof of the relevant
 14 product or geographic markets. To the extent that such pleading is required, however, the
 15 relevant product markets applicable to the TDC Affiliation are Adult PCP Services and
 16 Orthopedic Physician Services. In addition, the relevant product market applicable to the
 17 WestSound Acquisition is Orthopedic Physician Services. The relevant geographic market
 18 applicable to both the TDC Affiliation and the WestSound Acquisition is an area no larger than
 19 the Kitsap Peninsula including Bainbridge and Fox Islands. The State defines each of these
 20 markets in the following paragraphs of this Section V.

21 **A. Product markets**

22 35. Adult PCP Services consists of general physician services provided to
 23 commercially insured patients aged 18 and older by physicians practicing internal medicine,
 24 family practice, and general practice. It excludes obstetricians and gynecologists, as well as

1 pediatricians, because those physicians are not considered viable substitutes for Adult PCP
 2 Services by significant numbers of commercially insured patients aged 18 and older.

3 36. Orthopedic Physician Services consists of services, including surgery, provided
 4 to commercially insured patients by physicians who specialize as orthopedists to diagnose,
 5 treat, and rehabilitate injuries, disorders, and diseases of the musculoskeletal system.

6 **B. Geographic market**

7 37. An appropriate geographic market is the “area of effective competition where
 8 buyers can turn for alternate sources of supply.” *St. Luke’s*, 778 F.3d at 784 (quotation
 9 omitted). A common test to determine the boundaries of the relevant geographic market is to
 10 find whether a hypothetical monopolist controlling all services sold in the market could impose
 11 a small but significant and nontransitory increase in price (“SSNIP”) in the proposed market. If
 12 enough consumers respond to the SSNIP by going outside the proposed geographic market to
 13 purchase a service, then the proposed boundaries are too narrow. *Id.* If, however, the
 14 hypothetical monopolist is able profitably to impose a SSNIP, then the boundaries of the area
 15 are an appropriate geographic market.

16 38. The geographic market for Counts One (to the extent necessary) and Two is an
 17 area no larger than the zip codes that comprise the Kitsap Peninsula including Bainbridge and
 18 Fox Islands (“KP/BI”).¹ Payer data for claims submitted by providers that contain patients’
 19 residence zip codes make clear that KP/BI residents strongly prefer to receive Adult PCP
 20 Services and Orthopedic Physician Services close to their homes in KP/BI. Qualitative
 21 evidence also indicates that KP/BI residents prefer to receive care in KP/BI, rather than driving
 22 a longer distance and incurring a toll to visit providers across the Tacoma Narrows Bridge, or
 23 enduring the waiting, sailing time, and expense of a round-trip ferry voyage to visit providers

24
 25 ¹ Kitsap Peninsula and Bainbridge and Fox Islands include the zip codes 98110, 98310, 98311, 98312,
 26 98314, 98315, 98329, 98332, 98333, 98335, 98337, 98340, 98342, 98346, 98349, 98351, 98359, 98366, 98367,
 98370, 98380, 98383, 98392, 98394, 98524, 98528, and 98588.

1 in King or Snohomish Counties. Furthermore, quantitative and qualitative evidence, including
 2 Defendants' ordinary course of business documents, confirm that KP/BI is the relevant
 3 geographic market in which to analyze the effects of the Kitsap Transactions. For these
 4 reasons, to be competitively marketable to KP/BI employers and to meet network adequacy
 5 requirements, a payer's health insurance plan must include in its physician network a sufficient
 6 number of adult primary care physicians, as well as a number of specialists, including
 7 orthopedic physicians, who practice in KP/BI. Therefore, a hypothetical monopolist that
 8 controlled all providers of Adult PCP Services or Orthopedic Physician Services in KP/BI
 9 could profitably impose a SSNIP on payers.

10 **VI. DEFENDANTS' UNLAWFUL ACTIVITIES: THE TDC AFFILIATION**

11 39. In late summer 2015, five primary care physicians at TDC's Bainbridge Island
 12 location announced they would leave TDC and sign contracts with Swedish Medical Center to
 13 form the Swedish Bainbridge Island Primary Care clinic. This event, combined with other
 14 physician departures from TDC, caused TDC's physician shareholders to believe they would
 15 experience a sharp decline in their income relative to market averages. TDC therefore began
 16 looking for a well-capitalized partner that would infuse the clinic with enough cash to increase
 17 its physicians' salaries. At the same time, however, TDC strongly desired to maintain the
 18 physician self-governance and independence from other practices that had characterized TDC
 19 throughout its existence.

20 40. For its part, CHI Franciscan and its subsidiaries had long viewed a transaction
 21 with TDC as a strategic opportunity to neutralize a key competitor on the Kitsap Peninsula. At
 22 a May 2010 Harrison board of directors strategy meeting, CHI Franciscan's current Senior
 23 Vice President and Chief Strategy Officer, Thomas Kruse, advanced several scenarios as part
 24 of a "strategic thinking exercise." One such scenario involved entering into "[m]ultiple joint
 25 ventures" to "exploit[] a strong shift in the market that favorably biases partnering with
 26

1 physicians.” Mr. Kruse then revealed the endgame of this strategy: “Harrison (through
 2 Harrison HealthPartners) and the Doctor’s Clinic come together to form the solid foundation of
 3 a Kitsap PHO [physician-hospital organization], which is soon joined by the other large
 4 medical groups, and eventually even raises question with the DOJ for restraint of trade
 5 concerns – the ultimate compliment!” Later, in 2012 or 2013, Harrison’s then-President and
 6 CEO, Scott Bosch, threatened TDC’s leadership with signing away approximately a dozen
 7 TDC physicians and driving what remained of TDC’s practice into bankruptcy.

8 41. TDC and CHI Franciscan believed that their relationship became more
 9 cooperative and less adversarial following Franciscan’s 2013 acquisition of Harrison and Mr.
 10 Bosch’s 2014 retirement. Therefore, TDC and Franciscan began exploring the possibility of a
 11 closer partnership starting no later than 2015. Those discussions evolved through negotiation
 12 into the TDC Affiliation. Three written agreements serve as the primary legal basis for the
 13 TDC Affiliation: a Professional Services Agreement, a Management Services Agreement, and
 14 an Asset Purchase Agreement.

15 A. **TDC and FMG have agreed on prices to charge payers via the Professional Services
 16 Agreement.**

17 1. **Under the Professional Services Agreement, FMG jointly contracts with
 18 payers on behalf of itself and its competitor, TDC.**

19 42. At a meeting between CHI Franciscan and TDC on September 8, 2015, the
 20 parties’ representatives first discussed the contours of what would become the Professional
 21 Services Agreement (“PSA”) that formed the basis of their affiliation. CHI Franciscan pitched
 22 the PSA model as “[a]n option to contract w/group [TDC] as opposed to the individual”
 23 physicians. TDC would be compensated using an “RVU rate based on aggregate of the group’s
 24 RVU production,” with TDC then distributing income to its individual physicians. Importantly
 25 for TDC, the PSA would include independent “[g]overnance of the practice maintained by”
 26 TDC, and “TDC would manage the practice and be paid a management fee” by CHI
 Franciscan. In fact, “[b]illing/collecting & IT [information technology] were the only

1 centralized functions" under the PSA proposal. Those in attendance also discussed how to
 2 determine compensation based on RVUs, how to handle the ancillary facilities including the
 3 ASC, and "[r]etention of the TDC name and brand," among other topics. CHI Franciscan and
 4 TDC continued to negotiate the terms of their agreement throughout the rest of 2015 and the
 5 first eight months of 2016. At all times, both sides to the negotiations assumed that TDC would
 6 be paid using a volume-based, fee-for-service model based on wRVUs.

7 43. Under the PSA that TDC and FMG executed, TDC agreed that its providers in
 8 all specialties would provide medical services exclusively on behalf of FMG, and TDC's
 9 existing patients would become FMG patients. In exchange, CHI Franciscan agreed to
 10 compensate TDC based on a fee-for-service formula, with TDC receiving payment for wRVUs
 11 performed by TDC physicians at [REDACTED] % of the amount FMG pays to FMG-employed
 12 physicians in the same specialties according to FMG's wRVU-based rates. Specifically, FMG
 13 agreed to pay TDC a "draw amount" based on the actual wRVUs performed during the year by
 14 TDC's physicians, multiplied by FMG's rate schedule applicable to the "tier" of wRVUs
 15 performed by each physician, and further multiplied by [REDACTED] %. TDC then distributes that draw
 16 amount to its physicians based on its internal compensation schedule. In this manner, the more
 17 patients TDC sees, the more wRVUs it performs, resulting in a higher draw amount under the
 18 PSA's terms.

19 44. On the date the PSA took effect, TDC was required to, and did, cancel its then-
 20 current contracts with payers and immediately joined the contracts that FMG had in effect with
 21 payers, including FMG's contractual reimbursement rates. TDC did not have to renegotiate any
 22 payer contracts, but simply joined FMG's payer contracts by becoming credentialed with each
 23 payer as an "FMG Provider" and submitting charges to payers under FMG's tax identification
 24 number. TDC delegated to FMG "sole responsibility and authority to determine the fees to be
 25 charged to patients for" professional services rendered by TDC physicians, and to "maintain,
 26

1 negotiate and execute contracts with payors that pertain to the Professional Services.” The PSA
 2 provided that billing and collection for services provided by TDC “will be done under FMG’s
 3 tax identification number and in FMG’s name,” and “FMG shall be exclusively entitled to
 4 retain all remuneration for the same.”

5 45. Under the PSA, CHI Franciscan now jointly negotiates payer contracts on
 6 behalf of both itself and its competitor, TDC. TDC has no input into FMG’s rate negotiations
 7 with payors on TDC’s behalf. TDC admits that under the PSA, “all of TDC’s physicians have
 8 begun to contract through FMG’s payer contracts” and that it “does not expect to negotiate
 9 separately with payors for TDC physicians.” And as CHI Franciscan admits, pursuant to the
 10 PSA, TDC’s physicians “fell within the purview of the existing Payer Contracts previously
 11 negotiated by Franciscan.”

12 **2. Despite jointly negotiating with payers, TDC and FMG remain separate
 13 economic entities and compete to attract patients.**

14 46. Except for the prices they jointly charge to commercial healthcare payers, FMG
 15 and TDC remain independent economic entities. Each is controlled by separate boards of
 16 directors with no overlapping directorates. Each is owned by separate actors—FMG by FHS,
 17 and TDC by its physician shareholders—with no overlapping ownership. TDC is required by
 18 the PSA to maintain separate commercial general liability and professional liability insurance.
 19 Each maintains separate clinical protocols, medical directors, and procedures for addressing
 20 deviations from standards of care. TDC maintains the control it had before the TDC Affiliation
 21 over whether to hire a particular physician to work at TDC.

22 47. TDC’s physicians and non-physician employees remain employed by TDC, not
 23 by CHI Franciscan. The PSA specifies that TDC acts at all times as an independent contractor
 24 of FMG, without forming any type of employment relationship between FMG and TDC. TDC
 25 is solely responsible for its physicians’ salary, compensation, benefits, workers’ compensation

1 insurance, and similar items. TDC must indemnify and hold CHI Franciscan harmless against
 2 liability arising from any claim that TDC or its physicians are CHI Franciscan employees.
 3

4 48. TDC has also continued to use its own electronic health records (“EHR”)
 5 system, Intergy, and does not intend to transition to using CHI Franciscan’s EHR system, Epic.
 6 TDC’s ability to continue using Intergy, rather than integrating with Epic, was an essential
 7 condition to it signing the PSA. Indeed, it was a significant reason why TDC accepted less than
 8 100% compensation for its physician wRVUs under the PSA’s compensation formula. TDC
 9 and FMG also continue to use separate EHR systems and clearinghouses for processing bills to
 10 payers and patients, with no plans to combine systems in the future.

11 49. TDC and FMG viewed each other as close competitors for patients before the
 12 TDC Affiliation. TDC and FMG continue to compete for patient volume because the PSA
 13 incentivizes them to do so. Under the PSA, TDC is paid based upon the number of wRVUs
 14 performed by TDC physicians. Thus, for TDC to increase its revenues, TDC must serve more
 15 patients. A patient who is treated by a non-TDC physician will not contribute to TDC’s
 16 revenues under the PSA. Given that both FMG and TDC must draw from the same, finite pool
 17 of patients who seek care from KP/BI providers, it is in TDC’s financial interest to attract
 18 patients to TDC clinics over FMG clinics.

19 50. TDC and FMG have further demonstrated that they continue to compete for
 20 patients. A week before the TDC Affiliation took effect, TDC waived a non-compete clause in
 21 the employment agreement of one of its primary care physicians who wished to practice for
 22 FMG as an urgent care specialist. The waiver, however, specified that the physician could not
 23 practice primary care as an FMG physician for one year after Defendants signed the PSA. TDC
 24 admitted that it granted this waiver only because, by changing her practice area, the physician
 25 “was practicing not in direct competition” with her “same specialty” at TDC.
 26

1 51. TDC admits, in sworn answers to investigative interrogatories, that it “remains
 2 [a] separate entity, and TDC’s physicians remain under their own physician governance
 3 structure.” TDC further admits, in sworn investigative testimony, that in conducting the
 4 affiliation with CHI Franciscan, it was “absolutely” trying to remain as independent as possible
 5 operationally, while still affiliating with a large health organization.

6 52. TDC and FMG are therefore competitors. They are separate economic actors,
 7 with independent economic incentives, that have come together under the PSA for the
 8 exclusive purpose of jointly negotiating reimbursement rates with payers.

9 **B. FMG makes further support payments to TDC under the Management Services
 10 Agreement.**

11 53. As part of the TDC Affiliation, CHI Franciscan purchased certain ancillary
 12 services from TDC (discussed below) and also assumed the leases of the medical clinic
 13 locations in which TDC offered physician services. The parties desired, however, that TDC
 14 staff would continue to perform administrative, “back office” functions in exchange for a
 15 management fee. As a result, TDC largely continues to carry out the same administrative and
 16 operational duties in running its clinics as it did before the TDC Affiliation, allowing TDC to
 17 maintain control over its day-to-day operations.

18 54. Under the Management Services Agreement (“MSA”), TDC is required to
 19 “provide all services that are necessary and appropriate for the proper and efficient operation”
 20 of the medical clinic locations at which TDC practices, including the ambulatory surgery
 21 center. The services that TDC provides under the MSA include scheduling, reception, billing
 22 health plans and patients, all supply-chain functions, accounting, equipment and facility repair
 23 and maintenance, utilities, credentialing of providers with health plans, Medicare enrollment,
 24 operation of the ASC, and provision and maintenance of an electronic health records and
 25 practice management software system.

1 55. Given that FMG collects TDC's payments from health plans and patients, TDC
 2 must look to CHI Franciscan for funds to run its medical clinics. The MSA operates off a
 3 budget established by TDC and CHI Franciscan before each fiscal year, and “[i]t is the sole
 4 and absolute responsibility of TDC to operate within the Budget.” If TDC’s expenses for
 5 operating the medical clinics come in under budget, the MSA limits the amount of savings that
 6 TDC can retain. If TDC’s expenses for operating the medical clinic go over budget, it must
 7 forfeit its management fee and, under certain circumstances, reimburse CHI Franciscan for a
 8 portion of the latter’s costs in making up the difference.

9 56. The centrality of fee-for-service billing to the TDC Affiliation is also reflected
 10 in the MSA. The MSA obligates TDC to ensure that it “provides monthly, quarterly and annual
 11 reports in a format and level of detail reasonably acceptable to FMG regarding work Relative
 12 Value Units (‘*wRVUs*’) actually performed, billable and under the PSA.”

13 **C. TDC sells its ancillary services to FMG under the Asset Purchase Agreement and
 14 Defendants move services to Harrison.**

15 57. CHI Franciscan’s payments to TDC under the PSA and MSA represented
 16 increased costs to CHI Franciscan. To fund the cost of these agreements, CHI Franciscan
 17 needed a new source of revenue. Therefore, a crucial component of the TDC Affiliation was
 18 the sale of ancillary services—an ambulatory surgery center, laboratory, and imaging facility—
 19 from TDC to CHI Franciscan under the parties’ Asset Purchase Agreement (“APA”). CHI
 20 Franciscan paid TDC some \$ [REDACTED] for the ancillary services. The parties structured the
 21 deal such that CHI Franciscan made an up-front payment of about \$ [REDACTED] while
 22 simultaneously obligating itself under a promissory note to pay the approximately \$ [REDACTED]
 23 balance, plus interest, in a series of equal annual installments over the next five years. To TDC,
 24 this deal structure represented a guaranteed source of cash flow. To CHI Franciscan, it
 25 represented a chance for CHI Franciscan to acquire a dedicated source of profitable referrals to

1 Harrison, most notably in surgery and imaging, while spreading the acquisition's cost over
 2 several years.

3 58. When they began negotiating the sale of the ancillary services, CHI Franciscan
 4 and TDC contemplated that they would continue to perform most or all of the ancillary
 5 procedures at their existing TDC locations, but would apply CHI Franciscan's hospital-based
 6 rates in billing for those procedures. An obstacle arose, however, when CMS proposed a rule to
 7 implement Section 603 of the Bipartisan Budget Act of 2015 (Pub. L. 114-74). Under this "250
 8 yard rule," a provider's off-campus location must be located within 250 yards of a hospital
 9 facility in order to qualify for provider-based status and bill at the hospital's rates.² TDC's
 10 former ancillary facilities were, and are, all located over 250 yards away from Harrison, CHI
 11 Franciscan's only qualifying hospital facility in Kitsap County. TDC summarized this problem
 12 in a presentation at a March 2016 shareholders' meeting: the "250 yard rule interferes with the
 13 funding of the PSA as originally intended" because it "would NOT allow our ancillaries to be
 14 billed at a higher rate." Therefore, the parties decided to move to Harrison the majority of
 15 procedures that used to be performed at the ancillary facilities.

16 59. Even though Defendants recognized that this "ancillary movement is more
 17 complex and disruptive for patients and physicians," they also knew that CHI Franciscan's
 18 purchase of the ancillary services would allow them to shift procedures performed at those
 19 facilities to Harrison, with its attendant higher rates. The reduction in services performed at
 20 those facilities would both hobble TDC as a competitor and guarantee that CHI Franciscan
 21 would capture those services' revenue stream through Harrison. CHI Franciscan expected that
 22 revenue to outweigh the payments it was obligated to make to TDC under the PSA and MSA.
 23 Thus, from CHI Franciscan's perspective, purchasing the ancillary services more than made
 24 the PSA and MSA pay for themselves.

26 ² See Medicare Program: Payment to Certain Off-Campus Outpatient Departments of a Provider, 81 Fed.
 Reg. 45,604, 45,683-84 (Jul. 14, 2016).

1 60. CHI Franciscan's expectation has come true. In October 2016, the month after
 2 the TDC Affiliation took effect, Harrison's imaging center saw a volume increase of 17% over
 3 the previous month, which it attributed to the TDC Affiliation. Also in that month, Harrison
 4 observed growth of an additional 162 orthopedic surgical cases to that point because of the
 5 Kitsap Transactions. The exodus of procedures to CHI Franciscan's hospital facility is
 6 continuing. As a consequence, TDC's ambulatory surgery center is currently performing
 7 around half the procedures it did before the TDC Affiliation, and what remains are generally
 8 low-acuity, low-margin cases such as pain management and orthopedic hand surgeries. Finally,
 9 TDC's laboratory is currently performing roughly the same volume of services it did before the
 10 TDC Affiliation because TDC's and Harrison's laboratories are not integrated as a result of
 11 TDC's use of a separate EHR platform. But Defendants have admitted they intend to
 12 eventually close down TDC's laboratory and move those services to Harrison as well.
 13

14 61. In addition to the PSA, MSA, and APA described above, as part of the TDC
 15 Affiliation, FMG and TDC entered into other contracts and agreements that helped facilitate
 16 the anticompetitive TDC Affiliation.

17 **D. The TDC Affiliation has harmed payers and patients on the Kitsap Peninsula.**

18 62. The TDC Affiliation has eliminated the first, price-based stage of healthcare
 19 competition between CHI Franciscan and TDC. On the date the PSA took effect, TDC
 20 immediately began receiving higher reimbursement rates from health plans. TDC's
 21 reimbursements increased by an average of over [REDACTED] percent for payers across all
 22 physician services, and in the case of one payer, [REDACTED] percent. As a result of this loss of
 23 competition, healthcare payers have lost an important outside option in negotiating
 24 reimbursement rates, and Defendants' bargaining leverage has increased.

25 63. In addition to these immediate price impacts to TDC physician services, health
 26 plans, employers, and patients are paying significantly more, or will likely pay more in the

1 future, for ancillary imaging, laboratory, and outpatient surgical services as a result of pressure
 2 by CHI Franciscan for TDC physicians to direct patients to Harrison for those services.
 3 Because TDC is now encouraged to refer within the CHI Franciscan system, and because CHI
 4 Franciscan has closed TDC's imaging services, TDC now refers imaging patients almost
 5 exclusively to Harrison unless a patient specifically asks to be referred to Kitsap County's only
 6 other imaging provider, InHealth Imaging. Similarly, many procedures are no longer
 7 performed at TDC's ambulatory surgery center. The shift of these procedures has allowed CHI
 8 Franciscan to reap the financial benefits of its higher rates for these services. A TDC
 9 orthopedist acknowledged to CHI Franciscan that moving surgeries to Harrison entailed "extra
 10 cost for our patients" and lamented that the move was made for "solely financial reasons."

11 64. The shift in services has harmed Kitsap Peninsula patients in ways beyond
 12 higher prices. Shuttering TDC's imaging service has led to scheduling backlogs as TDC
 13 patients are referred to Harrison's overburdened imaging services. Early on in the TDC
 14 Affiliation, the backlog in imaging scheduling prompted a TDC physician to e-mail TDC's
 15 physician president to complain about an "influx of calls from patients not being called from
 16 Harrison regarding their imaging orders," noting delays of up to two weeks. The physician
 17 explained: "Sometimes the imaging test is fairly urgent, and cannot wait this long. I am trying
 18 not to refer anyone to In Health Imaging anymore as requested by our new relationship with
 19 the Franciscans, but I will be forced to for more urgent studies if this scheduling problem
 20 continues." TDC's physician president responded, acknowledging:
 21

22 It is a major source of dissatisfaction. I also feel your pain. We had a great
 23 radiology department and it will take some time and effort to work with CHI to
 24 have any chance to match what the TDC radiology department was. Some of
 25 our surgeons also have the additional joy of not using our surgical center. Our
 26 turn over times are significantly longer.

Several months later, CHI Franciscan's internal reports showed that patient scheduling at
 Harrison was still taking longer than expected, that scheduling calls to x-ray patients had

ceased entirely with the instruction instead to “rely on patient to walk-in or call,” and that patients complained of “excessively long hold times.”

65. Kitsap Peninsula patients have also seen service and choice reductions due to restrictions imposed on TDC physicians' practice by the Ethical and Religious Directives of the Catholic Church ("ERDs"). The PSA obliges TDC to abide by CHI Franciscan's ERDs and prohibits it from performing procedures banned by the ERDs. For TDC, this has meant that, at CHI Franciscan's direction, it has removed from its website all references to vasectomies and other sterilization services. TDC also admits that its physicians who wish to offer death with dignity services, which are lawful in Washington and which they offered before the transaction, may now do so only "as a moonlighting job" outside the scope of the PSA. They may not give the impression that they are associated with CHI Franciscan or TDC in any way, and may not rely on CHI Franciscan's or TDC's medical malpractice insurance policies in performing such services. One of TDC's physicians who provided death with dignity services acknowledged after the TDC Affiliation took effect that, "Due to the number of docs involved with CHI, there's getting to be a community access problem to find willing doctors who don't have this limitation. . . . The malpractice piece is proving problematic."

66. Lastly, the TDC Transaction undermines an emerging consensus among healthcare experts favoring value- and performance-based contracts that reward physicians for providing quality care, lowering costs, and successfully managing long-term conditions, rather than for fee-for-service, volume-based billing of expensive procedures. Indeed, the operative agreement in the TDC Affiliation expressly rules out the possibility of any quality-based, incentive compensation to TDC. Further, with respect to entering into value-based contracts like bundled payment or capitation-based arrangements in the future, CHI Franciscan admits that any such contracts would be set up through its existing ACO, RHN, and would not be exclusive to TDC or come about as a result of the TDC Affiliation.

VII. FIRST CAUSE OF ACTION (COUNT ONE): THE TPC AFFILIATION

67. The State hereby repeats and realleges each and every allegation of Paragraphs 1 through 66 as if fully set forth herein.

A. *Per se illegality*

68. Defendants FHS, FMG, and The Doctors Clinic entered into a contract, conspiracy, and agreement to raise prices and eliminate price competition with respect to physician services in Kitsap County. This contract, conspiracy, and agreement constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Washington Consumer Protection Act, RCW 19.86.030. This offense is likely to continue and recur unless the relief requested in Section X is granted.

69. These Defendants' agreement on and joint negotiation of reimbursement rates and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration sufficient to escape *per se* condemnation. With respect to CHI Franciscan's contracts with payers, CHI Franciscan and TDC do not share substantial financial risk and are not clinically or otherwise integrated in ways that would create the potential for increased quality and reduced cost of medical care that physicians provide to patients. As one example, the TDC Affiliation has not increased the number of value-based contracts to which TDC and CHI Franciscan are parties. Furthermore, the TDC Affiliation is not reasonably necessary to achieve efficiencies or other procompetitive justifications that would increase quality and reduce the cost of medical care, or, alternatively, its scope is broader than necessary to achieve any such efficiencies or procompetitive justifications. Even to the extent the TDC Affiliation's restraints may be reasonably necessary, any such efficiencies are not cognizable because they are not verifiable and/or arise from the anticompetitive effects of the TDC Affiliation.

1 **B. Illegality under the rule of reason**

2 70. Where, as here, defendants have engaged in a *per se* violation of the Sherman
 3 Act and the Washington Consumer Protection Act, no allegations with respect to product
 4 market, geographic market, or market power are required. To the extent such allegations may
 5 otherwise be necessary, the product markets for purposes of this Count One are Adult PCP
 6 Services and Orthopedic Physician Services, as defined above in Paragraphs 35 and 36. The
 7 geographic market for purposes of this Count One is an area no larger than KP/BI, as defined
 8 above in Paragraph 38.

9 71. CHI Franciscan and The Doctors Clinic have, through the TDC Affiliation,
 10 established market power in the KP/BI market for Adult PCP Services. Preliminary diversion
 11 analysis, described more fully in Paragraph 85, shows that prior to the affiliation, CHI
 12 Franciscan and TDC were each other's closest competitors for Adult PCP Services. Using the
 13 service area from which TDC attracts 75% of its patients, CHI Franciscan and TDC now
 14 possess a combined market share in excess of 50%, based upon wRVUs for adult PCPs who
 15 treat commercially insured patients. In the broader KP/BI market, the combined market share
 16 is over 35%.

17 72. In addition, via the TDC Affiliation and the WestSound Acquisition described
 18 below, Defendants have established market power in the KP/BI market for Orthopedic
 19 Physician Services, with a combined market share of over 63% in TDC's 75% service area,
 20 and a combined market share of over 55% in KP/BI.

21 73. Through the TDC Affiliation, CHI Franciscan and The Doctors Clinic have
 22 successfully imposed and sustained an immediate, significant increase in TDC's
 23 reimbursement rates for physician services charged to payers, including at least Adult PCP
 24 Services and Orthopedic Physician Services.

25 74. CHI Franciscan's and TDC's contract, conspiracy, and agreement has resulted
 26 in harmful and anticompetitive effects to consumers and healthcare payers, including:

- 1 a. increasing the reimbursement rates paid by commercial healthcare payers
- 2 for TDC's provision of physician services;
- 3 b. curtailing or eliminating competition on reimbursement rates for contracts
- 4 entered into with commercial healthcare payers;
- 5 c. increasing the bargaining leverage held by Defendants in negotiations with
- 6 commercial healthcare payers;
- 7 d. increasing the costs paid by commercial healthcare payers and patients for
- 8 services that used to be performed at TDC's ancillary facilities by increasing
- 9 referrals for those services to Harrison, with its attendant higher rates, and
- 10 diminishing the quality and choice of those services;
- 11 e. curtailing or eliminating competition for the referral of procedures to lower-
- 12 priced hospitals and ancillary facilities;
- 13 f. eliminating FMG's closest head-to-head competitor for Adult PCP Services
- 14 in first stage healthcare competition;
- 15 g. eliminating FMG's close competitor for Orthopedic Physician Services in
- 16 first stage healthcare competition; and
- 17 h. curtailing or eliminating physician services that are prohibited by CHI
- 18 Franciscan's ERDs

19 such that their contract, conspiracy, and agreement constitutes an unreasonable restraint of
 20 trade in violation of 15 U.S.C. § 1 and RCW 19.86.030.

21 **VIII. DEFENDANTS' UNLAWFUL ACTIVITIES: THE WESTSOUND ACQUISITION**

22 **A. The WestSound Acquisition**

23 75. Effective July 1, 2016, CHI Franciscan acquired the assets of WestSound for
 24 \$ [REDACTED]. The Asset Purchase Agreement between FMG and WestSound transferred all or
 25 substantially all of WestSound's assets, rights, and interests to FMG—including tangible
 26

1 personal property, intangible rights and assets, inventory and supplies, and permits and
 2 licenses—that it used in connection with its medical practice. FMG assumed the lease on
 3 WestSound’s Silverdale facility. In addition, the Asset Purchase Agreement assigned to FMG
 4 WestSound’s rights, title, and interest in the contracts it held with healthcare payers, and
 5 WestSound’s orthopedic physicians signed employment agreements, including compensation
 6 formulae, with FMG effective July 1, 2016. As CHI Franciscan admits, the “former
 7 WestSound Physicians have become employees of FMG,” practicing out of the same
 8 Silverdale and Bainbridge Island locations from which they practiced prior to the WestSound
 9 Acquisition. CHI Franciscan now contracts with payers on behalf of the WestSound
 10 physicians.

11 **B. Relevant markets**

12 76. The relevant product market in which to analyze the WestSound Acquisition is
 13 Orthopedic Physician Services, as defined above in Paragraph 36.

14 77. The relevant geographic market in which to analyze the WestSound Acquisition
 15 is an area no larger than KP/BI, as defined above in Paragraph 38.

16 **C. Market structure and the WestSound Acquisition’s presumptive illegality**

17 78. Under Section 7 of the Clayton Act, an acquisition is presumed to substantially
 18 lessen competition if it will lead to undue concentration in at least one market. The federal
 19 antitrust agencies’ *Horizontal Merger Guidelines* measure market concentration using the
 20 Herfindahl-Hirschman Index (“HHI”), a commonly used metric for determining market
 21 concentration by summing the squares of individual firms’ market shares. Under the
 22 *Horizontal Merger Guidelines*, an acquisition is presumed likely to create or enhance market
 23 power, and is thus presumed illegal, when the post-merger HHI exceeds 2,500 points and the
 24 merger or acquisition increases the HHI by more than 200 points.

25 79. The WestSound Acquisition, along with the TDC Affiliation, combines the
 26 three largest providers of Orthopedic Physician Services in KP/BI. CHI Franciscan’s post-

1 acquisition market share in the KP/BI Orthopedic Physician Services market, as measured by
 2 share of wRVUs performed, is over 55%. And, as measured by orthopedic physician
 3 headcount, CHI Franciscan now controls billing for all but a small handful of orthopedic
 4 physicians practicing in KP/BI.

5 80. In the Orthopedic Physician Services market, the concentration levels far
 6 exceed the *Merger Guidelines* thresholds. The pre-merger HHI was at least 1,368 and both
 7 Kitsap Transactions increased the HHI by 2,222 to at least 3,591—that is, by over eleven times
 8 the increase in concentration required for the presumption of illegality. The increase in HHI
 9 thus moved the market from “unconcentrated” to “highly concentrated” and enhanced
 10 Defendants’ market power.

11 81. The market shares reflected above likely understate the challenges that a health
 12 plan would face in attempting to offer a network that did not include the orthopedists
 13 contracted through CHI Franciscan. CHI Franciscan, TDC, and WestSound represent the vast
 14 majority of Orthopedic Physician Services available within KP/BI. The other providers with
 15 meaningful shares are primarily located in either the Seattle or Tacoma areas. A health plan
 16 would face a very difficult or impossible task of selling a network to Kitsap County employers
 17 and individuals that did not include any of the orthopedists contracted through CHI Franciscan.

18 82. The WestSound Acquisition is thus presumptively unlawful under long-
 19 established antitrust precedent. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363
 20 (1963).

21 **D. The WestSound Acquisition has resulted, and is likely to further result, in
 22 anticompetitive effects.**

23 83. While the above market definition and share calculations are sufficient by
 24 themselves to deem the WestSound Acquisition presumptively illegal, as a consummated
 25 merger, the WestSound Acquisition has created observable and significant anticompetitive
 26 effects that also render it likely to substantially lessen competition.

1 **1. The WestSound Acquisition has eliminated price competition and increased**
 2 **CHI Franciscan's bargaining leverage over commercial payers.**

3 84. The WestSound Acquisition has eliminated WestSound as CHI Franciscan's
 4 primary head-to-head competitor. It has thereby increased CHI Franciscan's ability and
 5 incentive to demand higher reimbursement rates from commercial payers.

6 85. Diversion analysis is a standard econometric tool that uses data on where
 7 patients receive healthcare services to determine the extent to which providers are substitutes.
 8 Here, preliminary diversion analysis shows that, before the WestSound Acquisition, CHI
 9 Franciscan and WestSound were each other's closest competitors for Orthopedic Physician
 10 Services. If all CHI Franciscan physicians providing orthopedic services were unavailable to
 11 patients, approximately 28% of patients would seek care at WestSound, and approximately
 12 23% of patients would seek care at TDC (now contracted through CHI Franciscan). The next-
 13 closest competitor practice would gain only 14.4% of CHI Franciscan's orthopedic patients.
 14 Conversely, if all WestSound physicians providing orthopedic services were unavailable to
 15 patients, nearly 45% of patients would seek care at TDC (now contracted through CHI
 16 Franciscan) and approximately 14% of patients would seek care at CHI Franciscan. In this
 17 scenario, the next-closest single competitor practice would gain only 6.7% of WestSound's
 18 orthopedic patients. In both scenarios, over half of patients would choose to receive Orthopedic
 19 Physician Services from a physician contracted through the other party to the merger.

20 Therefore, CHI Franciscan and WestSound are by far the closest substitutes for each other's
 21 orthopedic patients.

22 86. In addition to diversion analysis, Defendants' ordinary course documents reflect
 23 the close competition that existed between WestSound and CHI Franciscan before their
 24 merger. CHI Franciscan tracked WestSound's market share and volume before the WestSound
 25 Acquisition took effect. CHI Franciscan's CFO, Mr. Fitzgerald, informed CHI Franciscan's
 26 leadership that he viewed the WestSound Acquisition as a key "strategy to grow surgery

1 cases,” which was important because “[i]ncreasing our surgeries is about the fastest way to
 2 increase our bottom line.” And WestSound acknowledged to FMG’s Dr. O’Connor that the
 3 merger “expands market share for FMG/CHI.”

4 87. The loss of competition predicted by diversion analysis and Defendants’
 5 ordinary course documents has translated, unsurprisingly, into higher prices charged to
 6 commercial healthcare payers for orthopedic procedures. Under one major payer’s contract,
 7 shortly after the WestSound Acquisition took effect, the WestSound physicians’ allowable
 8 charges for arthroscopic shoulder surgery with rotator cuff repair increased by nearly █%; for
 9 arthroscopically aided anterior cruciate ligament (“ACL”) repair or replacement, by
 10 approximately █%; and for arthroscopic knee surgery with meniscectomy, by approximately
 11 █%. Overall, the WestSound Acquisition resulted in an over █% increase in payments for
 12 major orthopedic services by the largest payers on the Kitsap Peninsula. These price increases
 13 demonstrate that the WestSound Acquisition has already enabled Defendants to exercise
 14 market power.

15 88. The increased costs that Defendants are able to force commercial health plans to
 16 pay as a result of the WestSound Transaction have fallen squarely on Kitsap Peninsula
 17 employers and residents, particularly in higher co-insurance and deductible payments. And, in
 18 addition to the higher rates that CHI Franciscan is able to extract from payers due to the
 19 elimination of competition for payer contracting, patients have borne increased costs due to the
 20 shift in facilities the former WestSound physicians use to perform orthopedic surgeries.
 21 Procedures performed in an ambulatory surgery center setting are significantly less expensive
 22 than those performed in a hospital setting, such as Harrison. Meanwhile, Harrison is one of the
 23 more expensive hospitals in the Puget Sound region, further exacerbating the price differential.
 24 According to Washington State Hospital Association data, average and median charges for a
 25 major joint replacement performed at Harrison in 2016 were higher than three hospitals in
 26

1 King County: Seattle's Virginia Mason Medical Center and Swedish First Hill hospital, and
 2 Bellevue's Overlake Medical Center.

3 **2. The WestSound Acquisition has sharply reduced non-price competition on
 4 quality and choice.**

5 89. The acquisition of WestSound, along with the TDC Affiliation, has damped
 6 incentives for CHI Franciscan to improve or continue offering high-quality orthopedic
 7 services. Because CHI Franciscan now contracts on behalf of the vast majority of orthopedic
 8 physicians on the Kitsap Peninsula, CHI Franciscan faces minimal competition for KP/BI
 9 patients seeking orthopedic care.

10 90. Kitsap Peninsula residents have already noticed a decline in quality and choice
 11 as a result of the WestSound Acquisition. In publicly-filed comments to CHI Franciscan's
 12 application for a Certificate of Need to relocate Harrison's acute-care beds from its Bremerton
 13 campus to its Silverdale campus, one commenter expressed his concern over "the deteriorating
 14 quality and rising cost of healthcare in our region," due in part to the WestSound Acquisition.
 15 He wrote that "CHI Franciscan is on track to become THE dominant healthcare provider in the
 16 area. By purchasing all specialty clinics," including WestSound, "the result does not leave
 17 patients with cost-effective alternatives to obtaining healthcare services." Another commenter
 18 wrote: "In order to decrease their overhead CHI has cut emergency room staffing and nursing
 19 coverage causing painful and occasionally dangerous extended waiting times for treatment or
 20 hospitalization."

21 91. The former WestSound physicians now perform all their surgeries at Harrison.
 22 Previously, the WestSound physicians had performed many of their surgeries at two
 23 freestanding Kitsap County ambulatory surgery centers. CHI Franciscan's ordinary course
 24 business documents show it tracking the increase in outpatient orthopedic surgeries performed
 25 at Harrison as a direct result of the WestSound Acquisition, and lauding the positive results for
 26 its bottom line. In a memo to CHI Franciscan's executive team and board of directors, Harrison

1 President David Schultz celebrated Harrison's "[h]ighest volume month ever for Ortho!" in
 2 October 2016—an eighty percent increase in orthopedic surgical volumes over October 2015.
 3

4 92. As with the reduction in services at TDC's ASC, the shift of WestSound's
 5 orthopedic surgical procedures to Harrison has led to increased wait times. The shift has also
 6 removed a choice for patients who would prefer to have their surgeries performed at an ASC.
 7 With more convenient locations, shorter waiting times, and easier scheduling, ASCs generally
 8 offer greater convenience to patients than hospital outpatient departments. Across the country,
 9 patients have reported high satisfaction rates for the care and services received from ASCs.
 10 Meanwhile, CMS's Hospital Compare website reveals that, based on patient survey results,
 11 Harrison currently ranks below state and national averages for eight out of eleven patient
 12 experience measures, including pain control, receiving timely help from medical staff, and
 13 cleanliness. Without competition from WestSound's orthopedic procedures that used to be
 14 performed at ASCs, Harrison and CHI Franciscan have diminished incentives to improve their
 15 orthopedic service offerings.

16 **E. Entry**

17 93. De novo entry into the Orthopedic Physician Services market is unlikely to
 18 occur in a timely or sufficient manner to counteract the anticompetitive effects of the
 19 WestSound Acquisition. Existing competitors are also unlikely to reposition or expand in a
 20 manner that is timely or sufficient enough to offset the harm to consumers from the WestSound
 21 Acquisition.

22 94. New entry is unlikely due to the lack of available orthopedic physicians on the
 23 Kitsap Peninsula. Nearly all orthopedic physicians on the Kitsap Peninsula are either employed
 24 by or contracted through CHI Franciscan. The former WestSound physicians have non-
 25 compete clauses in their employment agreements with FMG, and the TDC physicians are also
 26 bound by the PSA's non-compete provisions. Thus, new competition from currently employed

1 or contracted CHI Franciscan physicians who could leave for private, independent practice is
 2 unlikely to occur. Even to the extent it did occur, it would not be timely enough to offset the
 3 WestSound Acquisition's competitive harm.

4 95. In addition, recruiting new physicians to KP/BI to replace the orthopedists lost
 5 to the Kitsap Transactions is difficult. Recent medical school graduates who wish to practice in
 6 Western Washington are more likely to begin their careers in the Seattle/Tacoma area, rather
 7 than KP/BI. FHS's Chief Medical Officer, Dr. Michael Anderson, testified at a public hearing
 8 that CHI Franciscan expects a shortage of orthopedists on the Kitsap Peninsula in the near
 9 future. In the past five years, only a handful of physicians have entered Kitsap County and set
 10 up independent practices in any specialty, let alone orthopedics.

11 96. Entry is also unlikely to timely counteract the anticompetitive effects of the
 12 WestSound Acquisition because the scope of entry necessary to create a viable substitute for
 13 WestSound is a daunting obstacle. CHI Franciscan accounts for over 26% of Orthopedic
 14 Physician Services in KP/BI, while WestSound accounts for another over 20%. Thus, before
 15 even considering issues of patient loyalty or WestSound's established brand prior to the
 16 WestSound Acquisition, a substantial number of orthopedists would have to enter the KP/BI
 17 market to replace the volume of orthopedic services that WestSound used to perform as an
 18 independent competitor.

19 97. Lastly, even to the extent new physicians could enter the market, or existing
 20 physicians could reposition to serve as competitors, they would face significant delays in
 21 becoming meaningful competitors. The process of recruiting an orthopedist, from initial
 22 outreach to start date, usually takes well over a year. Once recruited, the orthopedist must
 23 establish a patient base comparable to that of an established physician, which can take several
 24 more years. For these reasons, physician entry is unlikely to be timely or sufficient to
 25 counteract the substantial anticompetitive effects of the WestSound Acquisition.

1 **F. Efficiencies**

2 98. Defendants' alleged benefits of the WestSound Acquisition do not come close
 3 to the substantial, merger-specific, and competition-enhancing efficiencies that would be
 4 necessary to outweigh the WestSound Acquisition's significant harm to competition. No court
 5 has ever found, without being reversed, that an acquisition's claimed efficiencies were
 6 sufficient to rebut an otherwise illegal transaction. *See Saint Alphonsus Med. Ctr.-Nampa Inc.*
 7 *v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789 (9th Cir. 2015). Indeed, for acquisitions
 8 resulting in high concentration levels such as the WestSound Acquisition, proof of
 9 "extraordinary" efficiencies is required to justify the substantial harm to competition. *FTC v.*
 10 *H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001).

11 99. Defendants' alleged efficiencies are not cognizable because they are
 12 speculative, unverifiable, and/or not subject to quantification. Defendants claim the WestSound
 13 Acquisition will result in cost savings, but their claims lack evidentiary support. Furthermore,
 14 cost savings from a merger are only cognizable to the extent they are passed on to consumers,
 15 rather than bolstering the merging parties' profit margins. *See United States v. Anthem, Inc.*,
 16 855 F.3d 345, 362 (D.C. Cir. 2017). Precisely the opposite is true here. Health plans,
 17 employers, and patients have faced increased costs in the form of higher physician
 18 reimbursement rates and hospital-based charges for procedures previously performed in lower-
 19 cost settings.

20 100. Furthermore, many of Defendants' alleged efficiencies are not cognizable
 21 because they arise directly from anticompetitive reductions in competition and increases in
 22 price. CHI Franciscan admits that it has achieved its alleged efficiencies through "elimination
 23 of the competitive threat" posed by WestSound (and, for that matter, TDC). CHI Franciscan
 24 explained that post-merger, "that same threat would be now mitigated" because, when it comes
 25 to surgical referrals, the former WestSound physicians (and the current TDC physicians) can
 26 now "keep it in the family" at Harrison.

101. CHI Franciscan also claims that the WestSound Acquisition was necessary to stabilize the WestSound medical group, prevent WestSound physicians from leaving Kitsap County, and provide greater ability to recruit physicians to the community. CHI Franciscan admits, however, that it has achieved this purported efficiency by taking “the risk out of their compensation model” and compensating the physicians “on a work RVU model,” i.e., on a volume basis.

102. Defendants' alleged efficiencies are also not merger-specific because Defendants could accomplish them without any merger or acquisition. CHI Franciscan has admitted that efforts to achieve many of these claimed efficiencies were underway long before the WestSound Acquisition took effect—including through the Rainier Health Network ACO—or that alternatives to the WestSound Acquisition exist that could accomplish these efficiencies.

**IX. SECOND CAUSE OF ACTION (COUNT TWO): THE WESTSOUND
ACQUISITION**

103. The State hereby repeats and realleges each and every allegation of Paragraphs 1 through 38, and Paragraphs 75 through 102, as if fully set forth herein.

104. The WestSound Acquisition has substantially lessened, and is likely to continue to substantially lessen, competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and the Washington Consumer Protection Act, RCW 19.86.060. This offense is likely to continue and recur unless the following relief is granted.

X. PRAYER FOR RELIEF

105. To remedy these illegal acts, the State requests that the Court:

a. Adjudge and decree on Count One that Defendants Franciscan Health System, Franciscan Medical Group, and The Doctors Clinic entered into an unlawful contract, conspiracy, or agreement in unreasonable restraint of interstate trade and commerce, in the form of the TDC Affiliation, in

1 violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the
 2 Washington Consumer Protection Act, RCW 19.86.030;

3 b. Adjudge and decree on Count Two that Defendants Franciscan Health
 4 System, Franciscan Medical Group, and WestSound Orthopaedics entered
 5 into an acquisition, in the form of the WestSound Acquisition, the effect
 6 of which may be substantially to lessen competition or tend to create a
 7 monopoly, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18,
 8 and the Washington Consumer Protection Act, RCW 19.86.060;

9 c. Permanently enjoin and restrain Defendants from continuing to carry out
 10 the Kitsap Transactions;

11 d. Rescind and declare null, void, and unenforceable as contrary to public
 12 policy the contracts and agreements that Defendants entered into as part of
 13 the Kitsap Transactions;

14 e. Award to the State, on a joint and several basis, equitable disgorgement or
 15 any other equitable monetary relief for the benefit of the State and its
 16 consumers as appropriate under federal and state antitrust laws;

17 f. Award to the State the maximum civil penalties allowed under RCW
 18 19.86.140, for Franciscan Health System's, Franciscan Medical Group's
 19 and TDC's violations of RCW 19.86.030 as to the TDC Affiliation (Count
 20 One);

21 g. Award to the State its costs and a reasonable attorney's fee; and

22 h. Award such other and further relief as may be necessary and as the Court
 23 may deem just and proper.

24

25

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1 DATED this 31st day of August, 2017.
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